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In the Supreme Court of the United States

Supreme Court, U.S.
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MICHAEL RODAK, JR.

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE ON BEHALF OF PUBLISHERS OF THE FOLLOWING FLORIDA NEWSPAPERS: *TODAY*, TITUSVILLE *STAR ADVOCATE*, MELBOURNE *EVENING TIMES*, FT. MYERS *NEWS-PRESS* AND PENSACOLA *NEWS-JOURNAL*

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PENSACOLA NEWS-JOURNAL, INC.
(Pensacola NEWS-JOURNAL)

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INTEREST OF AMICUS CURIAE

The interest of undersigned amicus curiae exists by reason of the effect of the statute in question, Florida Statutes Annotated 104.38 (Appendix A), upon the relatively small newspapers represented in this brief, and the bearing that this effect has upon the unconstitutionality of said statute. This amicus curiae supports the position taken by Appellant, The Miami Herald Publishing Company, and concurs in its brief on the merits.

ARGUMENT

The crucial constitutional defect of the statute in question is the mandatory requirement upon Florida newspapers to publish "any reply" immediately upon the request of a candidate whose character is assailed, whose record is attacked, etc. There are other problems of vagueness and arbitrariness in the statute, but this mandatory requirement is a direct assault upon press freedom. The political function of newspapers is greatly reduced by this statute, especially small newspapers. The economic considerations, the cost of compliance, to the small newspaper, are a distinct factor in the mind of the editor who has to decide whether to publish a political criticism in the light of the statutory mandate. If he publishes ten inches against a candidate, he must immediately publish, free of charge, ten inches of any writing furnished by that candidate. Should he have to suffer this constant threat under the free press idea?

We do not intend to review law which has already been ably presented. The statute, which is quite old, historically has not been enforced, and has been held unconstitutional in

lower court decisions which were not challenged. State v. News Journal, 36 Fla. Supp. 164 (Volusia County, Fla. 1972). The statute was never considered much of a problem until the ruling of the Supreme Court of Florida, challenged by Appellant, The Miami Herald Publishing Company. Policies of newspapers to publish opposing views may account for the lack of attention to this statute but we submit that equally responsible would be the obvious defects in the statute. A layman reading the statute could see its impossibility of implementation. Every line of the statute has implementation and vagueness problems. The "any reply" phrase is an obvious defect and a thoughtful American layman would recognize it.

The largeness of the newspaper, THE MIAMI HERALD, stressed by the Supreme Court of Florida, cannot be the point of our problem. The United States has not yet come to the point of exchanging governmental control for laissez-faire in the newspaper world. By stressing the largeness or monopoly factor, the Supreme Court of Florida has forgotten the idea of a Fourth Estate, free and independent. The weak confession and avoidance statement in the opinion of the Supreme Court of Florida, attempting to clarify "any reply" as not intended to include libelous or obscene material, illustrates the forgetfulness of the Florida Supreme Court. The decision is a forgetting that the courts are an arm of the government, and that what is libel and what is obscenity depends upon the courts. An editor can read the volumes of opinions on what is libel and what is obscenity and still not know what to do. But the point of this writer is that the decision exchanges governmental control for press freedom. So not only does the editor fear to publish his own political comments about a political candidate, but he fears to interpret "any reply". He is therefore doubly prevented psychologically from freely publishing his views. It is simple. Only a court can decide

whether some reply should have been published. And so the judgment of courts is substituted for the judgment of newsmen.

In this day of Solzhenitsyn's reminders of Siberia, how can we in Florida afford to backslide on the major constitutional freedom? The big business argument must be abandoned unless we rewrite the Constitution to eliminate press freedom and substitute administrative regulation.

The economic factor is not the only difference of application of the statute respecting small newspapers. It is well known that small-town newspapers are close to their people and play a great role in reflecting the attitudes and political positions of the people. Small-town newspapers have great strength as instruments of expression and reflection of public opinion in local politics; and perhaps as instruments of forming political opinion. The decision challenged here tends to reduce the impact of the small-town newspapers in local politics, because of restraint by editors. This is clearly opposed to the free press doctrine of this country. The punch of a small newspaper in a small town is surgically removed by enforcement of this statute. An editor will be discouraged from printing an editorial about a political candidate which contains strong statements about the candidate.

Enforcement of the statute in question, as we have said, greatly reduces or eliminates the political function of a newspaper during elections. But looking ahead, doesn't the statute also open the way for administrative governmental publications, "public relations" organs of governmental agencies, to tell the people what they should do? The way is open for governmental control of political opinion. Governmental control is more to be feared than business monopoly. Monopoly, after all, is economically subject to antitrust regulations.

On a smaller scale we can see that a newspaper might delay making statements until the eve of an election. Granted, a conscientious editor would not do this, but the temptation would nevertheless be present. Again on a smaller scale, we submit that the publication of a newspaper during an election becomes the publication of charges and replies. Persons with no conceivable chance of election, persons tending towards mental incompetency, can qualify as candidates and obtain the same power over the press as bona fide candidates. Designing persons could use the statute in question to neutralize the newspaper's role. An incumbent could demand a reply to every critical comment, every disparaging letter to the editor, and every opposition advertisement. The issue of prominence of the reply opens a variety of litigious problems.

To the chilling effect of all of the above, we add the threat of immediate suit for injunction. Knowledge of this threat constitutes a restraint upon the press. The newsman knows he can be imprisoned for a mistake in judgment. Is not this, therefore, retrogressive law, fraught with danger to a reportedly free society?

The state is telling the newspaper what to print, and this is the rub. A large newspaper, assuming enough newsprint, might afford to go ahead and state its views and take a chance on plenty of space and newsprint for the replies. But a small newspaper would not have even this much latitude.

Assume a situation in a town where a stranger comes in and introduces himself into society as a professional person, and enters into politics. Assume he runs for a position on the local Democratic or Republican committee, and the newspaper discovers that he has a criminal record, that he is associated with vice or near-vice activities in other parts of the state or

country. Obviously, the newspaper's duty during the election is to print this information. Obviously, it is an assault upon the man's character, and so his reply, any reply by him, must be published. Every time the newspaper says anything about him, he can reply and it will be published. Will this eliminate the newspaper as a crusader for truth, and for enlightenment of the electorate? And what about the person who wishes to exploit, for some perverted reason, his unsavory past? He can do this. He can say, "I stole that money, but I stole it for a good reason," and he can go on and explain and dramatize his past, similarly to Curley of Boston and others. Consider the result of this statute if a person of the status of former Vice-President Agnew should move to a Florida community and enter into politics. Every recital of historical data concerning his plea of guilty and his resignation would entitle him to publication of his own arguments without end.

Everyone knows how newspapers depend upon wire service dispatches. Strong cirtical material comes through wire services, including the columns of Jack Anderson and similar columns. Should a newspaper fear to publish these columns during an election? The statute in question does not except presidential elections. It appears quite clearly that the publication of a Jack Anderson column criticizing a presidential candidate could result in mass replies in all Florida newspapers publishing the Anderson column.

What of the exposing of hoaxes, such as the Segretti letters about Senators Muskie and Jackson? Is it too far-fetched to speculate that the candidate under whose banner the letters were written, could freely enter the columns of the newspaper exposing the hoax? Photographs raise a completely new problem in themselves. What standard exists for the reply to a photograph?

Implementation of the statute in question in the wake of a Watergate scandal horrifies the fertile mind. The candidate whose record would be criticized would be vested with endless controls over the crusading newspaper. If there was ever a time in which a free press is needed and justified, it is now and in the foreseeable future. Freedom to criticize political candidates, unfettered by this statute, is essential to the restoration of political health. We have not come so far from the Peter Zenger trial that the State can now weave a mesh of restrictions on the press unforeseen by our revolutionary forefathers, and not contemplated in the United States Constitution.

It is not our intention to digress too far from our main thrust, that is to say, we wish to present the peculiar position and concern of relatively small newspapers. We feel that the removal of small-town newspapers from the mainstream of political life during elections is the most unhealthy result of enforcement of the statute in question. Their punch will be gone; they cannot expose a candidate's weaknesses without great economical and sociological detriment. This condition is something less than freedom of the press.

CONCLUSION

In spite of the unusual statement in the opinion of the Supreme Court of Florida, challenged herein, denoting the large size of THE MIAMI HERALD, the decision affects both small and large newspapers. We earnestly submit that the Court overlooked the areas touched on in this brief. These areas enlarge upon the vagueness and indefiniteness upon which lower courts have predicated their refusal to enforce this law. In its concern for possible evils of concentration of ownership,

the Court has upheld a statute which substitutes governmental for ownership control of newspapers in the area of elections. We respectfully urge the Court to declare FSA 104.38 unconstitutional and to grant the relief sought by the Appellant.

Respectfully submitted,

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FLORIDA STATUTE INVOLVED

Sec. 104.38 Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or Sec. 775.083.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Amicus Curiae were furnished by U. S. Mail this third day of March, 1974, to Paul & Thomson, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131 and Tobias Simon, Esquire, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130.

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